No. 860

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE SENECA NATION OF INDIANS, PETITIONER

v.

WILBER M. BRUCKER, SECRETARY OF THE ARMY, AND EMERSON C. ITSCHNER, MAJOR GENERAL, UNITED STATES ARMY CORPS OF ENGINEERS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General

PERRY W. MORTON,
Assistant Attorney General

ROGER P. MARQUIS,
Attorney,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	5
Conclusion	8

CITATIONS

Cases:	
Cherokee Nation v. *Southern Kansas Ry. Co.*, 135 U.S. 641	5
Henkel v. *United States*, 237 U.S. 43	5
Tuscarora Nation of Indians v. *Power Authority of the State of New York*, 257 F.2d 885, certiorari denied, 358 U.S. 841	5
United States v. *5,677.94 Acres of Land, etc.*, 152 F.Supp. 861	5
United States v. *Sioux Indians of Standing Rock Reservation*, 259 F.2d 271	6
United States v. *2,005.32 Acres of Land*, 160 F. Supp. 193	5-6
United States v. *21,250 Acres of Land*, 161 F. Supp. 376	5
Statutes and Treaty:	
Act of August 18, 1941, 55 Stat. 638	2, 4
Act of August 26, 1957, 71 Stat. 416	2, 4
Treaty proclaimed 1795, 7 Stat. 41	3
Miscellaneous:	
103 Cong. Rec.:	
pp. 9674-9675, 9676, 9683-9685, 9702-9709	7
p. 13977	4, 8
pp. 13980-13981	8
Hearings, House Subcommittee on Appropriations, 85th Cong., 1st Sess., on Public Works Appropriations for 1958, "Government Justification," part 2	7

Miscellaneous—Continued Page

Hearings, House Subcommittee on Appropriations, 85th Cong., 1st Sess., on Public Works Appropriations for 1958, "Private Testimony," part 1 7

Hearings, Senate Committee on Appropriations on H.R. 8090, "Civil Functions, Department of the Army" 7

H. Doc. No. 300, 76th Cong., 1st Sess. 4, 6

H.Rept. No. 552, 85th Cong., 1st Sess. 7

H.Rept. No. 1049, 85th Cong., 1st Sess. 6

H.Rept. No. 1864, 85th Cong., 2d Sess. 6

S.Rept. No. 609, 85th Cong., 1st Sess. 7

S.Rept. No. 1796, 85th Cong., 2d Sess. 6

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 860

THE SENECA NATION OF INDIANS, PETITIONER

v.

WILBER M. BRUCKER, Secretary of the Army, and EMERSON C. ITSCHNER, Major General, United States Army Corps of Engineers

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. App. 15-17) is reported at 162 F. Supp. 580. The opinion of the Court of Appeals (Pet. App. 18-20) is reported at 262 F.2d 27.

JURISDICTION

The judgment of the Court of Appeals was entered on November 25, 1958 (Pet. App. 21). By order of the Chief Justice, dated January 28, 1959, the

time for filing a petition for a writ of certiorari was extended to April 23, 1959. The petition was filed on April 22, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Congress, in approving a dam and reservoir project and appropriating monies therefor, manifested with sufficient clarity its intent to authorize condemnation of flowage easements over certain Indian lands which would necessarily be flooded by the project.

STATUTES INVOLVED

The relevant portion of the Act of August 18, 1941, 55 Stat. 638, 646, provides:

> In addition to previous authorizations, there is hereby authorized to be appropriated the sum of $45,000,000 for the prosecution of the comprehensive plan approved in the Act of June 28, 1938, for the Ohio River Basin, modified to include the Allegheny Reservoir project in accordance with the recommendation of the Chief of Engineers in House Document Numbered 300, Seventy-sixth Congress, first session.

The relevant portion of the Act of August 26, 1957, 71 Stat. 416, 417, provides:

> For the prosecution of river and harbor, flood control, shore protection, and related projects authorized by law; detailed studies, and plans and specifications, of projects (including those for development with participation or under consideration for participation by States, local

governments, or private groups) authorized or made eligible for selection by law (but such studies shall not constitute a commitment of the Government to construction); and not to exceed $1,600,000 for transfer to the Secretary of the Interior for conservation of fish and wildlife as authorized by law; to remain available until expended, $449,398,500: * * *

STATEMENT

This is a suit to enjoin the Secretary of the Army and the Chief of Engineers from commencing construction of a multi-million dollar flood control and river improvement project on the Allegheny River, upstream from Pittsburgh, Pennsylvania. The gravamen of the complaint is that Congress did not authorize with explicitness the taking of certain Indian lands which are essential to the project. Both courts below rejected the claim to injunctive relief on the ground that Congress' intentions had been made clear and specific. Pet. App. 16-17, 18-20.

The Seneca Nation of Indians has an interest in the Allegany Indian Reservation comprising approximately 31,000 acres in New York State along the Allegheny River. As to these and other lands, a treaty proclaimed in 1795, 7 Stat. 44, provided, *inter alia*:

> Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and

united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

By Act of August 18, 1941, 55 Stat. 638, 646, appropriations were authorized for prosecution of a comprehensive plan for improvement of the Ohio River Basin. The plan, as modified in the 1941 Act, included the Allegheny Reservoir project, as recommended by the Chief of Engineers in H. Doc. No. 300, 76th Cong., 1st Sess. In that document, the Chief of Engineers proposed construction of a dam at Kinzua, Pennsylvania, about 12 miles downstream from the Reservation. Under ordinary conditions, he advised, operation of the dam would permanently flood a relatively small part of the Allegany Reservation; in times of high flow, a substantial part of the Reservation would be flooded.[1]

In the Public Works Appropriation Act for 1958, enacted in 1957, Congress appropriated $1,000,000 for construction of the Allegheny project. The courts below found that in passing the 1941 and 1957 statutes Congress was fully aware of the rights of the Seneca Nation under its treaty and of the Tribe's opposition to the Allegheny project. They concluded

[1] Congress made further inquiry on the subject. Thus, on the floor of the Senate, Senator Ellender, Chairman of the Committee, said that he had called in the Corps of Engineers and they had reaffirmed the view that of the 30,000 acres 3,670 acres would be permanently flooded and possibly another 5,330 acres would be inundated now and then, depending on the river flow (103 Cong. Rec. 13977).

from a full examination of the legislative history, that Congress, after careful consideration of the objections, decided that the project should be authorized, notwithstanding the fact that it would require acquisition of the lands in question. The request for injunctive relief was thus denied on the ground that the taking was duly authorized.

ARGUMENT

Petitioner makes no challenge to the proposition, which has been long settled (see *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641), that Congress may authorize the exercise of the power of eminent domain in relation to Indian lands. See Pet. 6. Petitioner's argument is, in substance, that the Congressional authorization in the instant situation was not sufficiently explicit. But, as the opinions below hold and as the legislative history unmistakably demonstrates, Congress knew precisely what it was doing and it made its decision after careful consideration of the Tribe's objections, which had been vigorously expressed to the Congress.[2]

---

[2] The fact that legislation is "general," rather than "special," legislation could only be relevant from the standpoint of determining whether Congress was aware of the specific consequences of its authorization of the project. There is certainly no rule that authority to take Indian lands can be conferred only by special statute. See *Henkel* v. *United States*, 237 U. S. 43; *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 257 F. 2d 885 (C.A. 2), certiorari denied, 358 U. S. 841; *United States* v. *21,250 Acres of Land*, 161 F. Supp. 376 (W.D. N.Y.); *United States* v. *5,677.34 Acres of Land, etc.*, 152 F. Supp. 861 (D. Mont.) The statement in *United States* v. *2,005.32*

The Allegheny project, as noted above, was authorized by the Act of August 18, 1941 (*supra*, p. 3). The District Engineers' report, which Congress had before it, gave the specific advice that the Indian lands here involved would have to be acquired. H. Doc. No. 300, 76th Cong., 1st Sess., pp. 41-42.

The 1957 Act (*supra*, pp. 2-3) appropriated monies for various projects, including the Allegheny project to which the Conference Committee had allocated $1,000,000 for commencement of construction. H. Rept. 1049, 85th Cong., 1st Sess., p. 7. In making the specific appropriation for the Allegheny development, Congress acted with full awareness of the effect which the project would have on the Seneca reservation and of the Tribe's objections.[3]

The hearings on the appropriation measure show that for a total of more than 100 pages the pros and cons of the Allegheny project were discussed, with primary emphasis on the objections of the Seneca

---

Acres of Land, 160 F. Supp. 193 (S.Dak.), that "general legislation is not sufficient" to authorize the taking of Indian lands (Pet. App. 27) must be read in conjunction with the District Court's conclusion in that case that Congress, in enactment of the general statutes there involved, did not have "in mind the specific situation of the Standing Rock tribal lands, or even Indian lands in general" (Pet. App. 26). The case subsequently became moot. *United States* v. *Sioux Indians of Standing Rock Reservation*, 259 F. 2d 271 (C.A. 8).

[3] The committees of Congress, informed of the instant suit for injunction, have directed that construction should be held in abeyance pending disposition of this case. H. Rept. No. 1864, 85th Cong., 2d Sess., p. 10; S. Rept. No. 1796, 85th Cong., 2d Sess., p. 21.

Nation. On the Tribe's behalf, testimony was presented by its attorney, by its president, by two engineers and by three representatives of Indian Associations.[4] The controversy did not end when the House Committee included the item in its report. H. Rept. No. 552, 85th Cong., 1st Sess., p. 7. It was carried to the floor of the House where petitioner's supporters, led by the New York delegation, offered an amendment to strike the item from the appropriation. Both the proponents of the project, led by the Pennsylvania delegation, and the opponents recognized that rejection of the amendment would mean condemnation of the Indian lands. After considerable debate, the amendment was rejected by teller vote. 103 Cong. Rec. 9674-9675, 9676, 9683-9685, 9702-9709.

The same opposition was expressed in Senate hearings at which the subject was again explored at length.[5] In reporting the bill, the committee noted that it was overruling the objections of the Indians, expressing, at the same time, its desire that the flooding of the Indian lands be held to a minimum. S. Rept. No. 609, 85th Cong., 1st Sess., p. 26; Pet., p. 5. The project was not opposed on the floor of the

---

[4] Hearings, House Subcommittee on Appropriations, 85th Cong., 1st Sess., on Public Works Appropriations for 1958, "Government Justification," Part 2, pp. 111-128; *id.*, "Private Testimony," Part 1, pp. 451-479, 497-499, 501-503, 524-529, 675-688, 1024-1077.

[5] Hearings, Senate Committee on Appropriations on H. R. 8090, "Civil Functions, Department of the Army," pp. 785-791, 1217-1218, 1256-1257, 1290-1293, 1297, 1379-1388, 2285-2291, 2457-2478.

Senate, for, as Senator Ives said (103 Cong. Rec. 13977): "Neither are we trying to stop the building of the dam because, in one sense of the word, we want Pennsylvania to be entitled to what is coming to her." Various Senators stressed the obligation to make full measure of compensation "for the land which will be taken" (*id.*, pp. 13980-13981).

The history thus shows an unusually detailed consideration of the Allegheny project and of its impact upon the Seneca Nation. The matter was not only developed at extensive committee hearings but was also debated on the floor of both Houses. The courts below were plainly correct in holding that the Congressional purpose was clear and specific.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

MAY 1959

☆ U. S. GOVERNMENT PRINTING OFFICE 1959 505327